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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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No. 77-1470

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DELTA AIR LINES, INC.,  
*Petitioner,*

v.

CIVIL AERONAUTICS BOARD,  
*Respondent.*

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**REPLY BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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## TABLE OF CONTENTS

	Page
I. THE CIVIL AERONAUTICS BOARD .....	1
II. THE COMMITTEE OF FORMER NORTHEAST STEWARDESSES .....	3

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**I. THE CIVIL AERONAUTICS BOARD**

The Civil Aeronautics Board ("CAB" or "Board") has raised several points in its Brief in Opposition which call for a reply. First, it has confused one of the primary issues originally presented to the Board. The Board says that Delta's answer to the questions raised by the Board concerning alleged delay by Delta and Delta's supposed knowledge that the Northeast stewardesses desired arbitration was "that there were long periods in the course of the proceedings when no arbitration demand was made, and that failure of the Committee of Former Northeast Stewardesses or some other representative group to petition for arbitration at an early time during this period should bar the assertion of a right to arbitration regard-

less of the outcome of the inquiry suggested by the Board." (Brief in Opposition, pp. 5-6.)

The Committee of Former Northeast Stewardesses ("Committee") had maintained that it was the successor to the Transport Worker's Union ("TWU") and that therefore the Committee's request for arbitration related back to the original request made by the TWU, prior to the publication of an integrated seniority list by Delta. Delta pointed out that even if this were true, the Committee waited many months after the Board had dismissed the TWU's petition before filing another request to arbitrate. Delta said that the length of time between the CAB's dismissal of the TWU petition and the request from the Committee far exceeded the original time limits for filing. Since the Board had confirmed that Delta had acted correctly in not arbitrating with the TWU until and unless some evidence of its representative capacity was presented to Delta, there was absolutely no basis for anyone to contend that the Committee should then have longer than the originally applicable time period to respond to the Board's requirement that evidence of representative capacity be submitted. Delta's argument was not merely that "there were long periods in the course of the proceedings when no arbitration demand was made".

The Board's current contention that its statement, in the Order under review, "that the representational capacity of the union and other groups was unresolved" is not inconsistent with its previous orders is also incorrect. As the Board itself states, it held "that the union was not a representative of the stewardesses for purposes of invoking the arbitration provisions merely because it had previously been their collective bargaining representative." (Brief in Opposition, p. 6.) What the Board failed to say, however, was that it also confirmed that Delta had acted correctly in refusing to arbitrate until such

time as it received evidence of the union's representative capacity. Thus the question was not whether the union was in fact the representative of the former Northeast stewardesses for the purpose of arbitration, but whether, under the facts that had been presented, Delta had acted reasonably in refusing to arbitrate. As is discussed in greater detail below, the Board did decide this question and it was immaterial that "the factual question of representation remained unresolved." (In fact, no one ever presented any evidence of the TWU's representative capacity.) *What was clear, was that the Board had approved Delta's actions and that it later authorized the arbitrator to go behind the Board's decision on this point.* The Board continues to ignore this overriding fact.

## II. THE COMMITTEE OF FORMER NORTHEAST STEWARDESSES

In its Brief in Opposition, the Committee has misstated Delta's statements of fact and has then relied on a finding by the Arbitrator to show that the statements purportedly made by Delta are incorrect. For example, on page 3 of its Brief in Opposition, the Committee makes the following statements:

"Throughout the Petitioner's 'Statement of Facts', Delta continues to assert that it did not receive any complaints from any stewardess and further, that it received no request for arbitration for many months after the merger. (See variously Petitioner's Brief, pp. 5 & 7.)

"The record clearly establishes that this assertion is false and that the Northeast Committee made demand for arbitration to Delta Air Lines as early as September 28, 1972. The Arbitrator's Opinion and Award dated June 1, 1977 clearly responds to this assertion. Accordingly [sic] to the decision of Arbitrator Harry Platt:



'Like the CAB, the Arbitrator would consider Delta's recital of the facts, "if true to be dispositive of the question of timeliness" . . . The crux of Delta's position, as recited both to the CAB and in these proceedings is that, "No formal complaint and request [for arbitration] was received by Delta until April 5, 1974, or some twenty months after the merger became effective." *However, this assertion was demonstrably incorrect.* (Opinion and Award, p. 22. Emphasis supplied)' "

What Delta actually said, on page 5 of its Petition for Certiorari, is quoted as follows:

"Delta did not receive complaints from *any* stewardesses former Northeast or original Delta, after the integrated list was published, although the TWU had requested arbitration *before* the integrated list was published."

Thus, the Committee's assertion that Delta's statement "is false" is itself false because it misstates what Delta said. Delta has never denied that the TWU made a demand for arbitration before the integrated list was published by Delta on October 31, 1972.

The Arbitrator himself recognized that "The original Northeast negotiating committee may have erred by entrusting its demand for arbitration entirely to the TWU." (Arbitrator's Decision, p. 27.) Nevertheless, the Arbitrator found that a demand had been made and that the demand should have been honored by Delta. Delta contends that this finding by the Arbitrator was directly contrary to the Board's prior Order (73-9-42) in which the Board had specifically approved Delta's refusal to arbitrate with the TWU, absent proof of its representative capacity. The Committee does not dispute that no such proof was ever submitted by the TWU and that no further request was made until the Committee's request

was made in the spring of 1974. It was the possibility of this kind of confusion, as a result of the Board's ordering arbitration in the face of the prior order and the undisputed facts, that prompted Delta to appeal the arbitration order to the Court of Appeals and to request a stay pending judicial review. (This stay was denied.)

Thus, the basic question in this case is whether the case should have been sent to arbitration on the record *as it existed at the Board* at the time of the Board's order and in view of the Board's prior order concerning the TWU's request to arbitrate. Delta contends that it was precisely the contradictions in the Board's orders that made the Arbitrator's decision possible, by implying that issues previously decided by the Board could be relitigated. That the Arbitrator later found that the TWU request was valid cannot be a legitimate consideration in determining if the Board acted correctly in ordering arbitration.

The Court of Appeals itself found:

"The undisputed facts in the record before the Board do reveal that the Committee made no formal protest to Delta until many months after the Board's September 1973 decision on TWU's representational capacity." (Appendix 10a.)

The Committee has attempted to confuse even this finding by stating that Delta failed to continue with the language immediately following that quote which reads as follows:

"However, depending upon the Arbitrator's resolution of the issues posed by the Board, such a lapse of time could become irrelevant to the final outcome of the timeliness dispute."

There was nothing misleading in Delta's quotation. It was to support Delta's contention that the facts were and are undisputed. The language that followed did not change the Court's conclusion that the facts were undisputed, but rather seemed to indicate that the Board and

the Arbitrator need not be bound by the Board's prior order.

Again, it must be pointed out that it is a major part of Delta's appeal to contest the validity of the action of the Board, and later the Court, in allowing arbitration to proceed on the premise that the Board's prior order, in which it approved Delta's refusal to arbitrate with the TWU, was not dispositive of the issue of the validity of the TWU request. As Delta said on pages 20-21 of its Petition for Certiorari:

"With respect to the latter point [the question of whether Delta had delayed arbitration], the Court could only say that 'Furthermore, *whether or not such action was legally justified*, it cannot be denied that Delta's demands for formal representational authorization delayed both TWU's and the Committee's pursuit of the arbitration remedy.' (App. 11a.) *Such reasoning is circular and avoids the very question which should have been decided by the Court, and had in fact previously been decided by the Board, i.e., whether Delta's position 'was legally justified.'* The Board has specifically held that it was justified in Order 73-9-42 in which it made it clear that Delta was absolutely correct in demanding evidence of TWU's representational capacity. See Order 73-9-42 at pp. 4-5 (App. 5e-7e). In view of this finding, it is inconceivable that Delta could then be held to have delayed requests to arbitrate by not honoring the TWU's request absent evidence of its representational capacity.

"Thus the Court, as well as the Board, placed an impossible burden on Delta which was inconsistent with prior Board orders, the reasoning in the very order in which the Board ordered arbitration, and the undisputed facts.

"The Court said:

'The outcome of this case might have been different if there had been no factual basis in the record for the issues raised by the Board or if the legal aspects of those issues had previously been settled.' (App. 10a-11a.)

"As is pointed out above, the legal aspects of the representational question *had* previously been settled by the Board in Order 73-9-42. . . ." (Emphasis supplied.)

Delta has not misstated the facts as the Committee alleges.

Certiorari should be granted for the reasons stated in Delta's petition.

Respectfully submitted,

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